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ABSTRACT

This paper outlines concerns relating to the inclusion of students with disabilities in state and district educational assessments and the provision of non-standard accommodations (NSAs). The major concerns are that: (1) the term "non-standard accommodation" is an oxymoron and muddies the issue; (2) NSAs change the plain meaning of words beyond recognition and states are not clear about how to count and score tests using NSAs; (3) the current discussion of NSAs fatally confuses the role of the Individualized Education Program team and the role of the test producer; (4) no law requires NSAs to be used and scored with other test results; (5) NSAs leave educators, parents, and taxpayers in the dark, as they are shrouded in confusion; (6) NSAs expose districts and states to future litigation; (7) NSAs may lead to fewer appropriate educational services; and (8) the use of NSAs may not truly provide access to the general curriculum. It is recommended that states and districts be clear about their standards, provide clear instructions about what accommodations are allowed, develop a well-crafted waiver policy, and provide honorable exit documents for students who cannot meet state or district requirements on the test. (Contains 31 references.) (CR)

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Struggling Toward "ALL" in State and District Assessments What about Those Who Need Non-Standard Accommodations?

CCSSO Conference on Large-Scale Assessment Houston, Texas

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Introduction: Our goal is to open the dialogue on this critical issue. If you hear something that you agree with--or don't--let's talk!

It comes down to THE BIG QUESTION:
What good does it do to tell Johnny that he took and passed the reading test when we read it to him because he cannot read?

"Top 13" concerns with the stated question--talking points

1. **Let's start with the big picture: What are tests really about?**

   --Education, standards, higher expectations, meeting individual needs of children with disabilities, meaningful diplomas and other exit documents.

2. **"Non-standard accommodation (NSA)" is an oxymoron.**

   The term "non-standard accommodation" muddies the issues. Neither the IDEA nor Section 504 mentions this concept. Far better to use precise terms:**accommodations** and **modifications** because they directly face the key concept of a "fundamental alteration." See Appendix.

   Also, concerns about the words "need" and "all." We may be trying to fix the wrong problem through the law. If problematic issues are the result of psychometric or other educational matters, let's fix those. But let's not muddy the issue by misapplying legal requirements.

3. **Humpty Dumpty was right. Language is key!**

   NSAs change the **plain meaning** of words beyond recognition.

   *How many of you are willing to say that a student can take a **"reading test"** without having to decode words on a page or screen?*

   *--to say that **"reading"** and **"listening" comprehension** can count as the same skills?*

   *--to say that you can take/pass a **"writing/language arts test"** without having to spell or do grammar? or to take/pass a basic **"math test"** without having to know how to add or subtract?*

   Yet, states are allowing for the above--with lack of clarity about how to count and score tests using NSAs.

   Also, the bigger picture! Three examples of language:

   1. When did a **diploma** evolve to be a **benefit**? See, e.g., NCEO's "Non-Approved Accommodations" Policy Directions # 11. Legally, a diploma is a property or liberty **interest**--subject to due process protections. There's a big difference between a **benefit** and an **interest**.

   2. When did **earning a diploma** become a **denial of a diploma**? Students used "earn" a diploma. Now, many speak of a child "denied a diploma." Big difference. The first is standards-based. It does not require lawyers. The second is law/civil rights based. It invites lawyers in.

4. **The current discussion of NSAs fatally confuses the role of the IEP team and the role of the test producer.**

The IEP team is charged with determining HOW a student will participate in the state or district-wide testing program. While it should consider the test maker's instructions and test validity, the IEP team does NOT determine issues of test validity.

The current discussion of NSAs misconstrues the law and court/OCR decisions. OSEP attempted to clarify this: compare its August 24, 2000 Memorandum (written with OSERS) and its January 12, 2001 Clarification of the above Memorandum (written with the Office of Elementary and Secondary Education). See Appendix.

This area of the law has been, heretofore, well-settled. See, e.g., Office of Civil Rights and hearings decisions: *Los Angeles Unified School District, Nevada State Dept. of Educ., Alabama Dept. of Educ., Florida State Dept. of Educ., Prince George's County (MD) Pub. Schs.* Citations in Appendix.

5. **No law requires NSAs to be used and scored with other test results.**

"Section 504 imposes no requirement upon an educational institution to lower or to effect substantial modifications of standards to accommodate a handicapped person.' -- Southeastern Community College v. Davis.

"Altering the content of the [test] to accommodate an individual's inability to learn the tested material because of his handicap would be a 'substantial modification' as well as a 'perversion' of the diploma requirement. A student who is unable to learn ***because of*** *his handicap is surely not an individual who is qualified* ***in spite of*** *his handicap."*
--Brookhart v. Illinois.

Instead and ironically, while states and others are creating policies and settling cases in ways that are not legally warranted, the courts are upholding appropriate legal requirements.

- ♦See the Oregon and ETS "flagging" settlements
- ♦Compare with *Guckenberger v. Boston University*
- ♦See the Massachusetts DOE memorandum
- ♦See the California High School Exit Exam regulations
- ♦Compare with *GI Forum v. Texas Education Agency* and *Rene v. Reed.*

6. **In our federalist system--with the 10th Amendment--since STATES create NSA policies that fundamentally alter their tests, it is the STATES which--thereby--essentially forfeit test validity.** See the Pyramid of Laws.

Key concept: Courts follow the states in substantive decisions. See, e.g., PGA v. Casey Martin (golf cart), recently decided by the U.S. Supreme Court. If the states--the bearers of standards, **in accordance with the 10th Amendment,** allow NSAs which fundamentally alter the test, then the courts DEFER to educators' judgment. It is for you to decide if a reader on a reading test fundamentally alter the test.

Test makers (such as states) have the responsibility to determine what a test will measure and what the validity standards are. Courts do NOT. Courts do not make education judgments. They DEFER to educators.

7. **NSAs leave educators in the dark, as they are shrouded in confusion.**

See, for example, the following language, found in one state's explanation:

Non-standard accommodations *are modifications, in how the test is presented or in how a student responds to test questions, that* ***may alter*** *what the test measures but that are necessary in order for the student to access the test.* (Emphasis added)

Non-standard accommodations may ***not***

♦ *result in the* ***altering****, simplifying, paraphrasing, defining, or eliminating any test item, prompt, or multiple-choice option.* (Emphasis added)

What does this mean? Do they fundamentally alter the test--or not? I The state MUST decide: It may not use the word "may," for that confuses educators. This lack of precision is unacceptable.

8. **NSAs leave parents, the public, and taxpayers in the dark.**

NSAs defy common sense. They compromise the plain meaning of basic skills, such as the 3 R's.

Your taxpayers and neighbors will be surprised indeed to hear what the NSAs allow on reading, math, and writing tests. Your significant other will be surprised, unless he or she is in our business! And the parents and children you are trying to help--may feel cheated in the long run.

As well, these policies may lead to a loss of faith in the entire education reform effort--and to greater cynicism about our public schools.

9. **It's the ultimate slippery slope. Alas, not required by ANY federal law.**

Alas: To think that it all started with good people trying to do the right thing for kids and schools!

10. **NSAs expose districts and states to future litigation.**

The IDEA requires that parents receive all "relevant information" they need to make an informed decision for their child. With NSAs, the state or district may expose itself to future claims if--in fact--the student does not have the skills measured on the test (which were compromised by the NSAs). Can claims for compensatory and transition services--already hot areas of litigation--be far behind? And what of new legal theories?

11. **Ironically, NSAs may lead to fewer appropriate educational services.**

They may lead to a new form of exclusion. How do they differ from the days when children were excluded from difficult curricula and passed through? If a teacher knows that Bill can have the test read to him, why teach reading?

12. **And, we must ask, does it really provide "access" to the general curriculum--when we have changed that curriculum in this way?**

13. **My cousin's story.**

What to do instead? Recommendations

A. Be very clear about what the state and district standards are. What is fundamental? What have you decided needs to be taught and learned and tested.

B. Provide clear directions to teachers, parents, and students about what accommodations are allowed because they do not fundamentally alter the test. Provide modifications on IEPs, as needed.

C. Review the meaning of the word "all." Are we helping ALL?

D. Develop a well-crafted waiver policy. See *Rene v. Reed*.

E. Remember the big picture. Instead of going down the slippery slope of invalidating the tests, provide clarity. And, for students who cannot meet the state or district requirements as tested on the test, provide alternate meaningful, honorable exit documents.

Conclusion

Citations of Cases and Related Documents

(Some of these court decisions may be found at www.findlaw.com)

Alabama Dept. of Educ. 29 IDELR 249 (OCR 1998).

Alexander v. Choate, 469 U.S. 287 (1985).

Ann Arbor (MI) Pub. Sch. Dist. 30 IDELR 405 (OCR 1998).

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Brookhart v. Illinois State Bd. of Educ., 697 F. 2d 179 (7th Cir. 1983).

Debra P. v. Turlington, 644 F. 2d 397 (5th Cir. 1981).

Florida State Dept. of Educ., 28 IDELR 1002 (OCR 1998).

G I Forum v. Texas Education Agency, 87 F. Supp. 2d 667 (W.D. Tex. 2000).

Georgia State Dept. of Educ., 352:480 (OCR 1987).

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Goss v. Lopez, 419 U.S. 565 (1975).

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Joint Policy Memorandum on Assessments, 27 IDELR 138 (OCR and OSERS, 1997).

Los Angeles Unified School District, 33 IDELR 207 (SEA CA 2000).

Massachusetts Department of Education MEMORANDUM Regarding the Participation of Students with Disabilities in MCAS, Spring 2001 Update.

MEMORANDUM, "Questions and Answers about...the IDEA ...Related to Students with Disabilities and State and District-wide Assessments, OSERS and OSEP, August 24, 2000.

MEMORANDUM, "Clarification of the Role of the IEP Team in selecting Individual Accommodations, etc., " Elementary and Secondary Education and OSEP, January 12, 2001.

Mobile County (AL) Bd. of Educ., 26 IDELR 695 (AL 1997).

Nevada State Dept. of Educ., 25 IDELR 752 (OCR 1996).

Professional Golf Association v. Casey Martin, --U.S.-- (2001).

Prince George's County (MD) Pub. Schs., 33 IDELR 279 (OCR 2000); 34 IDELR 95 (OCR 2000).

Rene v. Reed, 32 IDELR 196 (In. Sup. Ct. 2000). Case is currently on appeal.

School Board of Nassau County (FL) v. Arline, 480 U.S. 273 (U.S. 1987).

Southeastern Community College v. Davis, 442 U.S. 397 (1978).

Sutton v. United Airlines, 119 S. Ct. 2139 (1999).

Texas Education Agency, 23 IDELR 566 (OCR 1995).

The Special Educator, March 23 and April 6, 2001 (articles about the Oregon settlement by this presenter), and June 15, 2001 (article about the Casey Martin case, quoting this presenter).

The Use of Tests as Part of High-Stakes Decision-Making for Students: A Resource Guide for Educators and Policy-Makers. U.S. Dept. of Educ., Office for Civil Rights (2000).

Virginia Dept. of Educ. 27 IDELR 1148 (OCR 1997).

Wynne v. Tufts University School of Medicine, 932 F. 2nd 19 (1st Cir. 1991); *Rehearing en banc*, 976 F. 2nd 791 (1st Cir. 1992).

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